

MOTION UNDER 28 USC § 2255 TO VACATE, SET ASIDE, OR CORRECT  
SENTENCE BY A PERSON IN FEDERAL CUSTODY

<b>United States District Court</b>		District <b>MASSACHUSETTS</b>
Name of Movant <b>ABELARDO CUEVAS</b>	Prisoner No. <b>18852-038</b>	Case No. <b>9T-10021-K</b> <i>CIV NO. 1305-CV-11474</i> <i>8-25</i>
Place of Confinement <b>FT. DIX CORRECTIONAL INSTITUTION (FEDERAL)</b>		
<b>UNITED STATES OF AMERICA</b> <b>V.    ABELARDO CUEVAS</b> <div style="text-align: right; font-size: small;">(name under which convicted)</div>		
<b>MOTION</b>		
1. Name and location of court which entered the judgment of conviction under attack <u><b>U.S. DISTRICT COURT</b></u> <u><b>FOR THE DISTRICT OF MASSACHUSETTS</b></u>		
2. Date of judgment of conviction <u><b>21 SEPTEMBER 1992</b></u>		
3. Length of sentence <u><b>235 MONTHS</b></u>		
4. Nature of offense involved (all counts) <u><b>CONSPIRACY TO POSSESS WITH INTENT TO DISTRIBUTE</b></u> <u><b>COCAINE</b></u>		
5. What was your plea? (Check one)		
(a) Not guilty <input checked="" type="checkbox"/>		
(b) Guilty <input type="checkbox"/>		
(c) Nolo contendere <input type="checkbox"/>		
If you entered a guilty plea to one count or indictment, and a not guilty plea to another count or indictment, give details:		
<u><b>N/A</b></u>		
6. If you pleaded not guilty, what kind of trial did you have? (Check one)		
(a) Jury <input checked="" type="checkbox"/>		
(b) Judge only <input type="checkbox"/>		
7. Did you testify at the trial?		
Yes <input type="checkbox"/> No <input checked="" type="checkbox"/>		
8. Did you appeal from the judgment of conviction?		
Yes <input checked="" type="checkbox"/> No <input type="checkbox"/>		

9. If you did appeal, answer the following:

(a) Name of court UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

(b) Result AFFIRMED

(c) Date of result \_\_\_\_\_

10. Other than a direct appeal from the judgment of conviction and sentence, have you previously filed any petitions, applications, or motions with respect to this judgment in any federal court?

Yes ☒ No ☐

11. If your answer to 10 was "yes," give the following information:

(a) (1) Name of court U.S. DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

(2) Nature of proceeding 28 U.S.C. B 2255

(3) Grounds raised INSUFFICIENT EVIDENCE/FAILURE TO ALLEGE DRUG QUANTITY  
IN THE INDICTMENT AND PROVE IT BEYOND A REASONABLE DOUBT TO THE JURY.

(4) Did you receive an evidentiary hearing on your petition, application or motion?

Yes ☐ No ☒

(5) Result DENIED

(6) Date of result DECEMBER 1998

(b) As to any second petition, application or motion give the same information:

(1) Name of court U.S. COURT OF APPEALS FOR THE FIRST CIRCUIT

(2) Name of proceeding 28 U.S.C. B 2255 SECOND OR SUCCESSIVE

(3) Grounds raised SAME AS ABOVE IN LIGHT OF BLAKELY

(4) Did you receive an evidentiary hearing on your petition, application or motion?

Yes ☐ No ☒

(5) Result DENIED

(6) Date of result APPROXIMATELY JULY 2004

(c) Did you appeal, to an appellate federal court having jurisdiction, the result of action taken on any petition, application or motion? N/A

(1) First petition, etc. Yes ☐ No ☒

(2) Second petition, etc. Yes ☐ No ☒

(d) If you did not appeal from the adverse action on any petition, application or motion, explain briefly why you did not:

THE ISSUE WOULD HAVE BEEN DENIED, DUE TO THE MISINTERPRETATION  
OF APPENDI PRE-BLAKELY.

12. State *concisely* every ground on which you claim that you are being held in violation of the constitution, laws or treaties of the United States. Summarize briefly the facts supporting each ground. If necessary, you may attach pages stating additional grounds and facts supporting same.

CAUTION: If you fail to set forth all grounds in this motion, you may be barred from presenting additional grounds at a later date.

For your information, the following is a list of the most frequently raised grounds for relief in these proceedings. Each statement preceded by a letter constitutes a separate ground for possible relief. You may raise any grounds which you have other than those listed. However, you should raise in this motion all available grounds (relating to this conviction) on which you based your allegations that you are being held in custody unlawfully.

Do not check any of these listed grounds. If you select one or more of these grounds for relief, you must allege facts. The motion will be returned to you if you merely check (a) through (j) or any one of these grounds.

- (a) Conviction obtained by plea of guilty which was unlawfully induced or not made voluntarily or with understanding of the nature of the charge and the consequences of the plea.  
 (b) Conviction obtained by use of coerced confession.

- (c) Conviction obtained by use of evidence gained pursuant to an unconstitutional search and seizure.
- (d) Conviction obtained by use of evidence obtained pursuant to an unlawful arrest.
- (e) Conviction obtained by a violation of the privilege against self-incrimination.
- (f) Conviction obtained by the unconstitutional failure of the prosecution to disclose to the defendant evidence favorable to the defendant.
- (g) Conviction obtained by a violation of the protection against double jeopardy.
- (h) Conviction obtained by action of a grand or petit jury which was unconstitutionally selected and impaneled.
- (i) Denial of effective assistance of counsel.
- (j) Denial of right of appeal.

A. Ground one: THE PETITIONER'S SIXTH AMENDMENT RIGHT TO TRIAL BY JURY WAS VIOLATED DUE TO COURT CONVICTING AND SENTENCING THE PETITIONER BASED UPON 'UNINDICTED/UNPROVEN' CONDUCT WHICH THE JURY DID NOT CONSIDER.

Supporting FACTS (state *briefly* without citing cases or law): \_\_\_\_\_

The government failed to meet its burden of proof by failing to list the drug quantity element in the indictment and prove it beyond a reasonable doubt to the jury, which is a structural error and a harmless error analysis amounts to speculation of the jury's verdict on appeal.

B. Ground two: THE PETITIONER DID NOT WAIVE HIS RIGHTS NOT TO BE SENTENCED PURSUANT TO THE MANDATORY GUIDELINE SYSTEM WITH RESPECT TO THE SIXTH AMENDMENT.

Supporting FACTS (state *briefly* without citing cases or law): The petitioner did not waive his Sixth Amendment rights not to be sentenced pursuant to the unconstitutional mandatory guidelines system and the Booker rule. There was no waiver and the petitioner had no 'recognized right' pre-Booker to appeal the fact that the unconstitutional guidelines were used against him, which would have denied as frivolous

C. Ground three: \_\_\_\_\_

Supporting FACTS (state *briefly* without citing cases or law): \_\_\_\_\_

D. Ground four: N/A

Supporting FACTS (state *briefly* without citing cases or law):

13. If any of the grounds listed in 12A, B, C, and D were not previously presented, state briefly what grounds were not so presented, and give your reasons for not presenting them: N/A

14. Do you have any petition or appeal now pending in any court as to the judgment under attack?

Yes ☐ No ☒

15. Give the name and address, if known, of each attorney who represented you in the following stages of the judgment attacked herein:

(a) At preliminary hearing

(b) At arraignment and plea

(c) At trial FRANK GERALD KELLEHER, 294 Washington Street suite 822-826  
Boston, Mass 02108

(d) At sentencing FRANK GERALD KELLEHER

(e) On appeal

(f) In any post-conviction proceeding

N/A

(g) On appeal from any adverse ruling in a post-conviction proceeding

N/A

16. Were you sentenced on more than one count of an indictment, or on more than one indictment, in the same court and at approximately the same time?

Yes ☐ No ☒

17. Do you have any future sentence to serve after you complete the sentence imposed by the judgment under attack?

Yes ☐ No ☒

(a) If so, give name and location of court which imposed sentence to be served in the future:

(b) Give date and length of the above sentence:

N/A

(c) Have you filed, or do you contemplate filing, any petition attacking the judgment which imposed the sentence to be served in the future?

Yes ☐ No ☒

Wherefore, movant prays that the Court grant him all relief to which he may be entitled in this proceeding.

\_\_\_\_\_  
Signature of Attorney (if any)

I declare under penalty of perjury that the foregoing is true and correct. Executed on

7/26/05

Date

Abelardo Cuevas

Signature of Movant



IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MASSACHUSETTS

UNITED STATES OF AMERICA

vs.

ABELARDO CUEVAS

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CRIMINAL NUMBER: 91-10021-K  
CIV. CASE No: 1:05-CV-11474

PRO SE CERTIFICATE OF SERVICE

I, ABELARDO CUEVAS, Petitioner herein, do hereby certify that an original and two copies of the foregoing filing has been furnished upon the Office of Clerk for the United States District of :

OFFICE OF THE CLERK  
U.S. DEPARTMENT OF JUSTICE  
UNITED STATES DISTRICT COURT  
DISTRICT OF MASSACHUSETTS

And a true and correct copy has been furnished upon the Office of the United States Attorney for the BOSTON District of MASSACHUSETTS :

ASSISTANT UNITED STATES ATTORNEY  
UNITED STATES ATTORNEY  
DEPARTMENT OF JUSTICE  
DISTRICT OF MASSACHUSETTS

I declare under penalty of perjury that the foregoing is true and correct. Executed on this day 26 of JULY, 2005

